

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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RLR:cjs:rs

July 15, 2009

Representative Pasch:

1. This is a preliminary draft. Please review it and let me know if it satisfies your intent. I will likely need to make some refinements and additions upon further review. It would be helpful to me to be able to review this draft with the Department of Justice or with a district attorney.
2. I assume that you want a court to be able to require an out-of-state company to produce information, but that you do not want to authorize Wisconsin law enforcement officers to execute a search warrant for this information out of state. The draft therefore grants authority to issue a "warrant," not a "search warrant." Federal law (18 USC 2703) does refer specifically to a "search warrant," but presumably federal law enforcement officers have jurisdiction to execute a search warrant nationwide. The Minnesota, Florida, and Massachusetts statutes provide for issuing "search warrants," and direct that upon service of the search warrant the recipient of the warrant "shall provide" records identified in the record. I do not know whether these state laws provide for a state officer to perform a search out-of-state.
3. 18 USC 2703 authorizes a variety of modes by which a court may compel a company to disclose information, including a search warrant, a court order, and an administrative subpoena. This draft authorizes only a warrant.
4. 18 USC 2703 requires a showing of probable cause before a court court may compel disclosure of the content of a wire or electronic communication, and requires a lesser showing of proof before a court may compel disclosure of certain subscriber information, such as name, address, service times, and credit card and bank account information. This draft requires probable cause before a court may compel disclosure of either communication content or subscriber information. Do you want to require a lesser showing of proof for disclosure of subscriber information?
5. 18 USC 2703 relies on definitions contained in the federal wiretap law (18 USC 2510). The definitions under the Wisconsin wiretap law (s. 968.27) are quite similar to the federal definitions for wiretap, but for some terms are not exactly the same. This draft uses the definitions under s. 968.27, except with respect to the definition of "wire communication." I did not use the definition under s. 968.27 (17) for "wire communication" because it refers to transfers made through facilities that are furnished or operated by a person engaged as a public utility. I assume you do not want

to limit the meaning of wire communication to transmissions made through public utilities. As an alternative to creating a second definition of “wire communication,” I could look into whether removing the reference to “public utility” in s. 968.27 (17) would be detrimental to application of the current wiretap law.

Also, this draft uses the definition of “electronic communication” under s. 968.27 (4) even though some of the exceptions differ from the exception in the federal definition under 18 USC 2510 (12).

6. The Minnesota statute (626.18) allows issuance of a warrant to an out-of-state corporation only if the corporation contracts or engages in a terms of service agreement with a resident of Minnesota to be performed in whole or in part in Minnesota. This draft does not contain a similar provision. Presumably 18 USC 2703 provides sufficient authority to make a warrant issued in Wisconsin enforceable against an out-of-state corporation. I do not know whether a provision such as in the Minnesota statute would aid enforcement.

7. The Minnesota law includes a provision requiring Minnesota corporations to comply with warrants issued by courts in other states. Do you want to create a similar provision for Wisconsin corporations?

8. Do you want to address payment to a company for the cost of complying with a warrant?

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